Supreme Court, U. S.
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In the

Supreme Court of the United States

No. 78-1346

OWEN G. COOK, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Owen G. Cook, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the above entitled cause on December 20, 1978.

OPINION BELOW

Judgment was entered by the trial judge of the United States District Court for the Western District of Texas, San Antonio Division, without opinion. The opinion of the United States Court of Appeals for the Fifth Circuit, dated December 20, 1978, is reported at 586 F.2d 572 (5th Cir. 1978). A copy of the opinion is attached hereto as Appendix A. The order of the Court of Appeals denying Mr. Cook's Petition for Rehearing and for Rehearing En Banc is unreported. A copy of that order is attached hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on December 20, 1978. A timely Petition for Rehearing and for Rehearing En Banc was filed by petitioner and denied on February 2, 1979. This petition is being filed within 30 days of that date. This Court has jurisdiction to review the judgment in question by writ of certiorari under 28 U.S.C. § 1254(1) (1976).

QUESTIONS PRESENTED

I. Does the jury instruction approved by the Fifth Circuit preserve the subjective standard of guilt dictated by decisions of this Court and of two other circuits?

A. Did the charge permit conviction on an objective (reasonable man) standard of guilt?

B. Is the defendant entitled to have his theory of defense presented clearly and affirmatively?

II. Does the indictment allege all essential elements of the crime?

A. Is willfulness an essential element of 18 U.S.C. § 287?

B. Must an indictment that relies on 18 U.S.C. § 2(b) allege willful causation?

C. Is an indictment under 18 U.S.C. § 287 deficient if it fails to allege that the claim was submitted to an agency of the United States?

STATUTES INVOLVED

United States Code, Title 18:

§ 2. *Principals*

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

§ 287. *False, fictitious or fraudulent claims.*

Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

Owen G. Cook, Jr., was indicted by grand jury on five counts alleging violation of 18 U.S.C. § 287 (1976). Each of the counts charged that Mr. Cook "did make and present and cause to be made and presented a false and fictitious claim against the United States, and a department and agency thereof, namely the United States Air Force." Each count was based upon a separate invoice (claim) presented under a government contract between Mikelco, Inc., and the General Services Administration ("GSA"). Each count further charged Mr. Cook knew the claim to be false and fraudulent because it included parts that Mr. Cook "well knew" had not been supplied.

Mr. Cook was the president and sole shareholder of Mikelco of Bandera, Inc. Mikelco of Bandera, Inc., leased (and later purchased) the Bandera, Texas plant from its prior owners (Mikelco, Inc., and Robert D. Bean) and continued performance of the existing government contract. Mr. Cook, who lived and worked in Abilene, Texas, made only ten visits to the Bandera plant during its entire period of activity and was never able to wrest managerial control from Bean, who continued to operate the plant. Because

of his inability to gain control, Mr. Cook closed the plant in December 1975. One year later Mr. Cook was able to obtain rescission of the purchase agreement.

None of the invoices was signed by Mr. Cook or submitted at his instruction. He had no knowledge of the specific content of any invoice. The Government's contention concerning the falsity of the invoices, and Mr. Cook's knowledge thereof, was based on the theory that Abtex Sales and Service, a supplier of parts to Mikelco of Bandera, Inc., was a fictitious company and never supplied the parts. Mr. Cook was an agent of Abtex.

According to the testimony of Richard Weber, an employee at the Bandera plant who had always worked under Bean, Weber carried on a course of fraudulent billing. At Bean's instruction, Weber would fill out supporting invoices from Abtex and 19 other suppliers (which were totally unconnected with Mr. Cook) with parts that had not been supplied. Weber testified Mr. Cook had once handed him a brown envelope, which he later found contained blank Abtex invoices.

The Government contended Mr. Cook knew invoices submitted to GSA were false and *caused* their submission either by virtue of his association with Abtex and Mikelco of Bandera, Inc., or because he had given Weber an envelope containing blank Abtex invoices. Mr. Cook defended on the basis that he was ignorant of the fraudulent practice originated and controlled by Bean. He had been deliberately kept in ignorance by Bean, who had instructed Bandera employees not to talk to Mr. Cook. Mr. Cook had seen an Abtex warehouse full of parts and believed Abtex to be a legitimate parts supplier.

The case was tried before a jury in the district court, which had jurisdiction under 18 U.S.C. § 3231 (1976). Over

Mr. Cook's objection, the jury was given an instruction purporting to present the "willful blindness" doctrine:

> [A] person who makes a claim or causes a claim to be made with reckless disregard of the truthfulness of the claim and with the conscious purpose to avoid learning the truthfulness of the claim is deemed to have knowledge of the claim and its truthfulness or lack thereof.

Mr. Cook requested the jury also be instructed to acquit him if they found he actually believed that Abtex was a bona fide parts supplier and that parts had been supplied. The trial judge refused to give this instruction as requested and ruled these points had been covered in the main charge.

After several notes indicating it was deadlocked, the jury finally returned verdicts of guilty on each count, and judgment of conviction was entered by the district court. Mr. Cook appealed this judgment to the Court of Appeals for the Fifth Circuit, contending, *inter alia*, that the trial judge erred in giving the charge on "reckless disregard" and in refusing to give the requested instruction on actual mistaken belief. Mr. Cook also contended the indictment was defective because it failed to allege claims were submitted to any government agency and because it failed to allege that he acted willfully, even though willfulness is an implied essential element of 18 U.S.C. § 287 and an express element of section 2(b).

In its opinion the Court of Appeals upheld the instruction without addressing Mr. Cook's argument that the instructions erroneously presented an objective standard of guilt, rather than the proper subjective standard. The indictment was also approved. The Court of Appeals held willfulness was not an essential element of section 287 because it does not appear in the statute. Although willfulness is an express

element of an offense under section 2(b) and, as such, required to be alleged in the indictment under decisions of this Court, the Court of Appeals found this section was "merely a codification of the law of principals" and added nothing to the substantive offense.

REASONS FOR GRANTING THE WRIT

I. The jury instruction approved by the Fifth Circuit failed to preserve the subjective standard of guilt dictated by decisions of this Court and of two other circuits.

A. The charge permitted conviction on an objective (reasonable man) standard of guilt.

The issue of whether Mr. Cook knew of the course of fraudulent billing described by Weber was central to Mr. Cook's defense. Without admitting that the specific instances of false billing alleged in the indictment had taken place, Mr. Cook contended throughout the trial that he held a bona fide belief that invoiced parts had been supplied. He testified he believed Abtex was a legitimate parts supplier; he had actually seen its extensive parts inventory. The existence of the parts inventory was confirmed by two other witnesses. To bring this issue before the jury, Mr. Cook requested the jury be instructed to acquit him if it found he held an actual, though perhaps mistaken, belief that Abtex had been a legitimate parts supplier. The instruction given not only omitted this crucial element, but described an *objective* standard of knowledge ("reckless disregard") that actually removed from the jury's consideration the issue of the significance of Mr. Cook's actual belief. That instruction was erroneous, and the Court of Appeals' approval of the instruction conflicts with decisions of this Court and courts of appeals for other circuits.

This Court has noted with approval the definition and safeguards for the defendant incorporated in the Model Penal Code explication of the "willful blindness" doctrine. *Turner v. United States*, 396 U.S. 398, 416 n.29 (1970); *Leary v. United States*, 395 U.S. 6, 46 n.93 (1969). The test cited in *Leary* and *Turner* incorporates a *subjective* standard of knowledge: "When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, *unless he actually believes that it does not exist.*" Two separate *subjective* elements are necessary to show willful blindness. The defendant must have been aware of the probable existence of the guilty fact, but even this awareness will not suffice if the defendant actually believed the guilty fact did not exist. Omission of these subjective elements creates a drastic departure from our traditional standards of culpability. Punishment is based not on what the accused knew or intended but on what another would have known or intended in his place. Our standards of criminal justice simply do not permit conviction on the basis of what the accused should have known, regardless of the fact he actually believed his actions were innocent.

Courts of appeals for other circuits have adopted the Model Penal Code standards. The Ninth Circuit, sitting en banc, has held that the jury must be instructed to apply a subjective standard to the issue of knowledge. *United States v. Jewell*, 532 F.2d 697 (9th Cir.), *cert. denied*, 426 U.S. 951 (1976). If willful blindness is placed in issue and evidence concerning the defendant's actual belief is presented, the jury must be given a direct instruction to acquit if they find the defendant actually held a belief in facts establishing his innocence. *United States v. Esquer-Gamez*, 550 F.2d 1231 (9th Cir. 1977). The Second Circuit also has held that

a subjective standard must be preserved by "balancing" the willful blindness instruction with an explanation of the significance of the defendant's awareness or actual belief. *United States v. Bright*, 517 F.2d 584 (2d Cir. 1975). *See also United States v. Morales*, 577 F.2d 769 (2d Cir. 1978) (where evidence raises issues of awareness of high probability or actual belief, willful blindness instructions must be "balanced" by explanation of these factors).

The Fifth Circuit consistently has failed to apply the safeguards the Second and Ninth Circuits have held are mandatory. The instruction approved in this case permitted and encouraged the jury to use an objective reasonable person standard. By focusing on the judge's undefined "reckless disregard" standard, the jury could have convicted Mr. Cook if they found his *actual belief* that parts had been supplied was recklessly held. Indeed, by arguing Mr. Cook's dereliction in controlling his new company, the prosecution actually encouraged the jury to base its verdict on this finding. Reckless failure to supervise is not now a crime. *United States v. United States Gypsum Co.*, 435 U.S. 1005 (1978). In fact, in February 1979 the American Bar Association strongly opposed a provision of S. 1437 that would impose for the first time criminal liability for reckless failure to supervise. *See* Appendix C.

The opinion of the Court of Appeals simply failed to analyze the propriety of an *objective*, recklessness standard. The court relied instead on its approval of similar language in *United States v. Evans*, 559 F.2d 244 (5th Cir.), *cert. denied*, 434 U.S. 1015 (1978), thus clearly establishing as law in the Fifth Circuit that reckless disregard will suffiice for actual knowledge.

The decisions of the Fifth Circuit in *Evans* and this case have brought the court into direct conflict with other

circuits. The issue is not purely formalistic; rather, it involves questions about the requisite "guilty mind" essential to our concept of criminal justice. The use of an improper standard of *mens rea* will result in convicting and incarcerating the accused on the basis of civil standards of liability, contrary to this Court's recent decision in *United States v. United States Gypsum Co., supra.* The significance of this issue extends far beyond the alleged false claims involved in the case — the significance extends to virtually *all* crimes in which guilty knowledge is an element of the offense. The Court should grant this Writ of Certiorari to restore an appropriate standard for knowledge and to ensure proper administration of criminal justice.

B. The decision below conflicts with the decisions of other courts of appeals in sanctioning the trial judge's refusal to present the defense theory clearly and affirmatively.

The instruction on actual (albeit mistaken) belief requested by Mr. Cook was crucial to his defense, especially in light of the prosecution's reliance on its theory of reckless disregard. The requested instruction presented Mr. Cook's defensive theory affirmatively (rather than by negative implication). It explained the significance of Mr. Cook's actual good faith belief that parts were supplied by Abtex. It would thus have helped to balance the trial judge's objective "reckless disregard" language, as required by *United States v. Bright*, 517 F.2d 584 (2d Cir. 1975). The Court of Appeals nevertheless approved the failure to give the requested charge.

The court's opinion concludes the requested instruction was "substantially" covered by the judge's general instruction that "an act is done knowingly if done voluntarily and intentionally and not because of mistake or accident or

other innocent reason." The court concluded that this part of the general charge, coupled with the presumption of innocence, adequately apprised the jury of the significance of Mr. Cook's good faith belief.

This conclusion is patently erroneous. The presumption of innocence combined with the elements the prosecution is required to prove will cover any defensive theory *by negative implication*, assuming that jurors are alert enough to understand the significance of this implication. But an accused is entitled to more than this. Mr. Cook's theory should have been presented affirmatively as he correctly requested. *United States v. Young*, 464 F.2d 160 (5th Cir. 1972); *Strauss v. United States*, 376 F.2d 416 (5th Cir. 1967).

The Ninth Circuit has held that the jury must be clearly instructed that the defendant must be acquitted if he actually believed the guilty facts did not exist, no matter how recklessly, negligently, or foolishly. *United States v. Esquer-Gamez*, 550 F.2d 1231 (9th Cir. 1977); *United States v. Jewell*, 532 F.2d 697 (9th Cir.), *cert. denied*, 426 U.S. 951 (1976). Thus, in addition to squarely presenting Mr. Cook's defensive theory, the requested charge was absolutely necessary to explain what kind of conduct could constitute "reckless disregard," which was never defined for the jury.

II. The indictment fails to allege all essential elements of the crime charged.

The indictment in this case contained no allegation of the defendant's state of mind, other than to say Mr. Cook "well knew" referenced parts had not been supplied. The indictment failed to allege Mr. Cook had *willfully* made or presented false invoices or *willfully* caused false invoices to be presented. The indictment is deficient for failing to allege willfulness, an implied essential element of 18 U.S.C.

§ 287 and an express element of section 2(b). The indictment also fails to allege the claims were submitted to an agency, department, or officer of the United States.

A. The decision below erroneously holds willfulness is not an essential element of 18 U.S.C. § 287, in conflict with the Eighth Circuit.

The opinion of the Court of Appeals did not contest the well-settled principle that an indictment must allege every essential element of the crime, whether express or implied, including state of mind requirements. *See Russell v. United States*, 369 U.S. 749 (1962). Nor did the Court of Appeals find that the allegation of knowledge was sufficient to charge Mr. Cook had acted willfully. *See United States v. Mekjian*, 505 F.2d 1320 (5th Cir. 1975). The holding of the Court of Appeals was based solely on its finding that willfulness was not an essential element of 18 U.S.C. § 287.

The court's opinion on this issue is in direct conflict with the holding of the Eighth Circuit in *Johnson v. United States*, 410 F.2d 38, 47 (8th Cir.), *cert. denied*, 396 U.S. 822 (1969). Section 287 was attacked in *Johnson* as being unconstitutionally vague in failing to define the prohibited conduct or provide sufficient warning to the defendant. The court held the implied element of willfulness is necessary to preserve the constitutionality of the statute, stating: "The requirement that the government prove, as an essential element of their case, that the defendant's conduct was 'willful' relieves the statute of the objection that it punished without adequate warning."

The Court of Appeals acknowledged that 18 U.S.C. § 1001 (a companion statute to section 287) expressly requires willfulness. The court held, however, that "Congress's inclusion of the term 'willfully' in section 1001 while omitting

the term in section 287 suggests an intent to exclude this state of mind from the essential elements of the latter offense." This Court, however, recently held in *United States v. United States Gypsum Co.*, 435 U.S. 1005 (1978), that Congress is presumed to legislate against a common-law background that renders intent a critical factor and that more than the simple omission of a state-of-mind requirement is needed to overcome this presumption. *See also Morissette v. United States*, 342 U.S. 246 (1952).

The Court of Appeals cites *United States v. Bramblett*, 348 U.S. 503 (1955), for a point directly contrary to the holding of that case. The Court of Appeals stated that, under *Bramblett*, "section 1001 should not be employed to construe section 287's requirements." In *Bramblett*, however, section 287 was actually used to construe section 1001. This Court held: "The difference between the language of § 287 and that of § 1001 can only be understood in the light of legislative history. That history dispels the possibility of attaching any significance to the difference." 348 U.S. at 509.

The opinion below directly conflicts with the position of another circuit. In addition, the opinion seriously distorts the meaning of one Supreme Court case and ignores the teachings of other decisions. This Court should correct these conflicting interpretations of a statute of increasing importance to the public.

B. The decision below conflicts with decisions in other circuits requiring that an indictment which relies on 18 U.S.C. § 2(b) must allege willful causation.

Mr. Cook never signed or submitted any invoice under the contract. In the indictment and at trial, the Government relied on the theory Mr. Cook had *caused* submission of false

invoices. Where a person willfully causes a prohibited act to be done, that person is punishable as a principal under 18 U.S.C. § 2(b). However, that section applies solely to *willful* causation; it was amended by Congress in 1951 solely and expressly to add the word "willfully." Accidental, negligent, or reckless causation is not a crime.

Ignoring Congress's 1951 amendment and the resulting language of section 2(b), the Court of Appeals held section 2 was merely a codification of the law of principals. Section 2 comprises two different parts: subsection 2(b) (causing), which requires willfulness, and subsection 2(a) (aiding and abetting), which does not. While Congress originally may have intended merely to codify the law of principals, it went beyond this original purpose when it expressly amended section 2(b) to incorporate a state-of-mind requirement. Thus, cases cited by the Court of Appeals that deal with section 2(a), holding that an individual can be convicted as an aider and abettor without being indicted in these terms, are inapplicable to the present case.

If an indictment fails to allege willful causation or use words of similar import, we must speculate whether the grand jury found this element to be present. Such an indictment is manifestly improper. *United States v. Russell, supra.*

Courts in other circuits have rejected indictments containing this defect. *United States v. Beard*, 414 F. 2d 1014 (3d Cir. 1969); *United States v. Blackshere*, 282 F. Supp. 846 (D.N.M. 1968). The Court of Appeals refused to follow these cases, relying instead on cases interpreting section 2(a) and the pre-1951 version of section 2(b). The court has placed itself in conflict with courts of other circuits and has failed to implement the express intent of Congress.

C. An indictment under 18 U.S.C. § 287 that fails to allege that the claim was submitted to an agency of the United States is fatally deficient.

Section 287 applies only to claims *against* the United States which are presented *to* an officer, agency, or department thereof. The indictment in this case completely failed to allege that claims were submitted *to an officer, agency, or department* of the United States.

There can be no doubt that presentation for payment *to* an officer or agency constitutes a separate element of 18 U.S.C. § 287. *See, e.g., United States v. Bramblett*, 348 U.S. 503, 505 (1955). Presentation for payment *to* a specified officer or agency is the action that completes the offense. If a person drafts a fraudulent invoice or circulates it for comment, that person has not committed a crime. Similarly, it would not be a crime for a person to submit to the FBI for investigation a false invoice he had discovered, because that would not constitute presentation for payment. Furthermore, the model indictment, Form 10, FED. R. CRIM. P., upon which both the Government (in its brief) and the Court of Appeals relied as expressing all elements of the offense, specifically includes an allegation that a false claim *against* the United States was presented *to* an agency thereof.

The indictment demonstrates *on its face* that the grand jury may not have believed all the elements of an offense under section 287 were present. The source of the grand jury's uncertainty may be the same confusion in the Government's proof that confronted Mr. Cook and the jury. Abtex invoices were presented to Mikelco of Bandera, Inc. Invoices from Mikelco of Bandera, Inc., were presented to GSA, the procuring agency. At trial, however, the prosecution claimed presentation was to Kelly Air Force Base and that GSA was

merely the "agent" of Kelly. By this theory, venue was obtained in San Antonio. The jury could have focused on any of these various submissions. Similarly, the jury may have believed Mr. Cook *caused* Abtex invoices to be submitted *to* Mikelco of Bandera, Inc., or, because of failure to keep tight rein on activities in Bandera, in some way *caused* the submission of false invoices *to* GSA or Kelly. Some of these combinations may constitute a crime under section 287, but others clearly do not. Unrestrained by any particular language in the indictment, the prosecution was free "to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal." *Russell v. United States*, 369 U.S. 749, 768 (1962). *See also United States v. Lambert*, 501 F. 2d 943 (5th Cir. 1974).

Mr. Cook urged this point in connection with the variance argument in his appeal, but the opinion in the Fifth Circuit completely fails to address the issue. The court's reliance on the model form for another point indicates it also failed to even consider the point in its deliberations. However, the dictates of this Court in *Russell, supra*, may not be ignored. In this case it is clear the grand jury never charged Mr. Cook with commission of a crime under section 287, and this Court should grant the Writ of Certiorari to ensure the protections of *Russell* are not overlooked.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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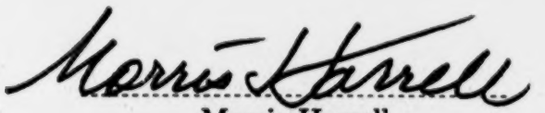
CERTIFICATE OF SERVICE

I, MORRIS HARRELL, a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing Petition for Writ of Certiorari on counsel for respondent by depositing three copies of same in the United States mail, first class postage prepaid, this 1st day of March, 1979, addressed to the Solicitor General, Department of Justice, Washington, D. C. 20530, and to the Office of the United States Attorney, United States Courthouse, 655 E. Durango Blvd., San Antonio, Texas 78206.



Morris Harrell

UNITED STATES of America,
Plaintiff-Appellee,

v.

Owen G. COOK, Jr.,
Defendant-Appellant.

No. 78-5173.

United States Court of Appeals,
Fifth Circuit.

Dec. 20, 1978.

Defendant was convicted in the United States District Court for the Western District of Texas, at San Antonio, Adrian A. Spears, Chief Judge, of submitting false and fictitious claims on government contracts, and he appealed. The Court of Appeals, Edwin F. Hunter, Jr., District Judge, sitting by designation, held, inter alia, that the conviction was supported by the evidence.

Affirmed.

Jack Paul Leon, San Antonio, Tex., Morris Harrell, Daniel J. Riley, Marshall J. Doke, Jr., Dallas, Tex., for defendant-appellant.

Jamie C. Boyd, U. S. Atty., Le Roy Morgan Jahn, W. Ray Jahn, Wayne F. Speck, Asst. U. S. Attys., San Antonio, Tex., for plaintiff-appellee.

Appeal from the United States District Court for the Western District of Texas.

Before GEE and VANCE, Circuit Judges, and HUNTER,* District Judge.

EDWIN F. HUNTER, Jr., District Judge:

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* Senior District Judge of the Western District of Louisiana, sitting by designation.

Owen Cook was convicted by a jury on five counts of submitting false and fictitious claims on government contracts in violation of 18 U.S.C. § 287. Cook was sentenced to consecutive terms of five years imprisonment under two counts of the indictment and fined a total of $25,000 on the remaining three counts. He appeals his conviction asserting numerous errors in the trial below.

On May 1, 1975 appellant Cook purchased Mikelco, Inc. from Carl Dunlap. The company, which was located in Bandera, Texas, was engaged in overhauling and repairing aerospace ground equipment for the United States Air Force under government contract. Cook renamed the company Mikelco of Bandera, Inc.

On May 12, May 29, June 12, June 24, and September 15, 1975, allegedly false invoices were submitted to the government pursuant to the contract. The scheme generally involved charging the government for ostensibly new parts that actually had been stolen from equipment previously sent for repair. The company also overbilled for legitimate parts and labor or created invoices from fictitious companies indicating purchases never actually made.

Appellant Cook raises five main issues on appeal. After careful consideration, finding no merit in any of the assignments of error, we AFFIRM.

I. SUFFICIENCY OF THE INDICTMENT

As his first ground for reversal, appellant argues that the indictment is insufficient because it fails to allege that he acted willfully. In *United States v. Beasley*, 550 F.2d 261 (5th Cir.), *cert. denied*, 434 U.S. 938, 98 S.Ct. 427, 54 L.Ed.2d 297 (1977), the defendant therein advanced the same argument that willfulness is an essential to a false claim violation under 18 U.S.C. § 287. While not reaching the issue of whether willfulness is a necessary element because the concurrent sentence doctrine rendered the issue moot, this court did discount the same authority the appellant now offers to support his contention:

> Appellants rely heavily upon *United States v. Mekjian*, 505 F.2d 1320 (5th Cir. 1975) and *Johnson v. United States*, 410 F.2d 38 (8th Cir. 1968), *cert. denied* 396 U.S. 822, 90 S.Ct. 63, 24 L.Ed.2d 72 (1969). These cases do not provide the comfort sought. *Mekjian* arose under 18 U.S.C. § 1001, where both willfully and knowingly are required by the words of the statute. In *Johnson* the court seems to be holding that when one is charged with knowingly making a false claim and evidence is adduced showing knowledge of the requirements of the contract with the governmental agency and the complete disregard for such, and thereafter the jury is properly charged regarding the necessity of the government proving that such claims were false, fictitious and fraudulent and made knowingly and intentionally, "willfulness" has been established.

Id. at 270, n. 12.

Appellant does correctly point out that 18 U.S.C. § 1001, a companion statute to 18 U.S.C. § 287, expressly requires willfulness. However, *United States v. Bramblett*, 348 U.S. 503, 75 S.Ct. 504, 99 L.Ed. 594 (1955), wherein an exhaustive analysis of the origin and history of changes in §§ 287 and 1001 is developed, indicates that section 1001 should not be employed to construe section 287's requirements. Additionally, Congress' inclusion of the term "willfully" in section 1001 while omitting the term in section 287 suggests an intent to exclude this state of mind from the essential elements of the latter offense. This judicial assessment of legislative intent is substantiated by the fact that the congressionally approved Form 10 of the Federal Rules of Criminal Procedure designed for section 287 indictments omits willfulness as an element of the offense. The indictment in the instant case in all pertinent respects substantially follows that form.

Alternatively, appellant Cook argues that even if willfulness is not required to validly charge the false claim offense, his being charged with "causing" the submission of the false claims activates 18 U.S.C. § 2 in which willfulness is an ele-

ment. 18 U.S.C. § 2 is merely a codification of the law of principals. An individual can be convicted as an aider and abettor of an offense without being indicted in those terms, *United States v. Young*, 527 F.2d 1334 (5th Cir. 1976), and can be convicted as a principal even though the evidence establishes that he has only aided and abetted. *United States v. Trollinger*, 415 F.2d 527 (5th Cir. 1969). Persons accused only of causing another to do an illegal act need not be formally charged under § 2 and an indictment is sufficient if it alleges the criminal intent required for the substantive offense. *Londos v. United States*, 240 F.2d 1 (5th Cir.), *cert. denied*, 353 U.S. 949, 77 S.Ct. 860, 1 L.Ed.2d 858 (1957). Since the court finds that willfulness is not an essential element of 18 U.S.C. § 287, appellant's first attack must fail.

II. VARIANCE BETWEEN THE INDICTMENT AND THE PROOF

Appellant alleges that there was a variance between the indictment and proof because the government at trial proved that the fraudulent claims were sent to the General Services Administration in Dallas where they were checked and certified before being forwarded to the United States Air Force for payment. On the other hand, the indictment charges that the claims were submitted for payment to the United States Air Force, an agency of the United States. The appellant therefore maintains that the government should have included "through GSA" in the indictment.

It is clear that not every variance is fatal to an indictment. *Berger v. United States*, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935); *United States v. Lambert*, 501 F.2d 943 (5th Cir. 1974). A variance between the allegation and proof to require reversal of a conviction must affect the substantial rights of the accused. Such rights are not affected where the defendant is adequately apprised of the charges against him so that he may prepare his defense without surprise at trial, and may protect himself against another prosecution for the same offense. *Berger v. United States*, *supra*, 295 U.S. at 82, 55 S.Ct. at 630.

Prejudice to the defendant and possibilities of double jeopardy are negligible here because the indictment listed five individual offenses, specifically identifying each claim by date, number and item. The technical variance encountered here is best relegated to the "immaterial" category.

III. SUFFICIENCY OF THE EVIDENCE

Cook next maintains that the evidence is insufficient to support a verdict of guilty. The standard for review is that "the verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942); *United States v. Vomero*, 567 F.2d 1315, 1316 (5th Cir. 1978). In the instant case there is substantial evidence to support the verdict.

At trial defense counsel did not challenge the existence of the fraudulent scheme but attempted to prove that Cook had no personal knowledge of the false billing practices and never instructed anyone to bill in that manner. The evidence of Cook's participation is largely circumstantial. However, the standard for review of the sufficiency of evidence to support conviction is the same whether the evidence is direct or circumstantial. *See Holland v. United States*, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150 (1954); *United States v. Palacios*, 556 F.2d 1359 (5th Cir. 1977); *United States v. Warner*, 441 F.2d 821 (5th Cir.), *cert. denied*, 404 U.S. 829, 92 S.Ct. 65, 30 L.Ed.2d 58 (1971).

Owen Cook visited the Bandera plant four or five times during May and once or twice a month thereafter until the plant closed down in early December. Cook also spoke regularly via telephone with Robert Bean, a previous owner, and Richard Weber, the material control manager, who actually performed most of the falsification at Bean's command.

The testimony of Richard Weber, the government's key witness, came closest to directly implicating Cook. Weber testified that during the routine phone calls he would get on the line after Bean and Cook had conversed. Cook would

inquire, "what are we going to do this week, Richard?" Weber's response would always be a dollar figure, representing his estimate of "whatever we could spend that week on falsified invoices" — the difference between amount actually spent on labor and parts and the higher figure submitted to the government as an inflated estimate of what the repairs would cost.

Weber also testified that he retained a stock of blank invoices from 19 or 20 supply companies, many of which were fictitious. One of these companies was Abtex Sales & Service of Abilene, Texas, either owned or officered by Cook. The five claims at issue in the government's case were each supported by invoices from Abtex which Weber testified he had totally invented. Weber further stated that on one occasion Cook handed him a brown envelope, commenting that he heard Weber "needed more of these." Weber indicated that the envelope contained blank Abtex invoices. There was also some evidence that Cook personally used the proceeds of Mikelco checks that paid for "purchases" from Abtex.

It is clear that appellant through this assignment of error, as evidenced by his brief, is merely attempting to argue the credibility of the witnesses and the weight to be afforded their testimony. That responsibility rests exclusively with the trier of facts, in this case the jury, and those who reside in the ivory towers of appellate review must resist the temptation to retry cases.

In a related vein to the sufficiency of the evidence issue, appellant contends the trial court's deferral of the ruling on the motion for acquittal as to one count is reversible error. At the close of the government's case, Cook moved for acquittal. The trial judge denied the motion with respect to four counts but deferred ruling on the motion regarding Count II. The failure to grant the motion by deferring a ruling does not necessarily require a reversal. *Montoya v. United States*, 402 F.2d 847 (5th Cir. 1968). This court in *United States v. Guinn*, 454 F.2d 29, 33 (5th Cir.), *cert.*

denied, 407 U.S. 911, 92 S.Ct. 2437, 32 L.Ed.2d 685 (1972), explained the scope of the deferred-ruling doctrine:

> The doctrine means only that a defendant is entitled to a judgment of acquittal if the evidence at the close of the Government's case is insufficient, and that the trial judge may not, be (*sic*) deferring decision on the defendant's motion, allow sufficient evidence to be supplied by the defense or by the prosecution on rebuttal.

Appellant's reliance here on the deferred-ruling doctrine is misplaced. As previously illustrated, the evidence was sufficient to support a conviction when the prosecution rested. Thus, any error in the district court's failure to rule promptly on the motion was harmless.

As a corollary to his sufficiency argument, Cook criticizes the trial judge for delivering three *Allen*-type charges to the jury. *See generally Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896). The first time the judge mentioned any of the *Allen* language was during the initial jury charge. (R. Vol. VI, 1158-59). However, it would be unfair to characterize this as a traditional *Allen* charge. The trial judge merely asked each of the jurors to avoid announcing an emphatic opinion until listening to the others. He also requested them to re-examine their views, while admonishing them not to surrender an honest conviction simply for the purpose of returning a verdict. This language is unobjectionable, given its mild form and context within the entire charge.

The second objected to instruction, reproduced in its entirety below,[1] is more properly delineated an *Allen* charge.

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[1] The jury retired at 9:40 a. m. on Friday, January 20, 1978 to consider a verdict. Having failed to reach unanimity by 5:00 that afternoon, the jurors were instructed to return on Monday, January 23, 1978 for further deliberations. After less than two hours of deliberation on Monday, the jury communicated to the court that they were deadlocked. The following instruction was then delivered:

THE COURT: Good morning. Well, members of the jury, I have your note which says that you still remain divided after reviewing the material and voting again, and also this statement of your

foreman to the effect that you do not feel that any further discussion will make any difference in the outcome.

Let me say a few additional words to you. This is an important case to the defendant, to the United States, and to the administration of justice. You know how long the case has been on trial. There is nothing to indicate that it can better be tried or presented at some other time any more exhaustively than it has been on both sides of the case during this trial. It is highly desirable from the standpoint of all concerned, the parties, the lawyers, the Court, and the public, that you agree upon a verdict if that is at all possible.

The Court does not want any juror to surrender his or her conscientious conviction. Each juror should perform his or her duty conscientiously and honestly according to the law and the evidence. Although the verdict to which a juror agrees, of course, must be his or her own verdict, the result of his or her own convictions, and not a mere acquiescence in the conclusions of other jurors, yet, in order to bring 12 minds to a unanimous result, you must consider the matters submitted to you with candor and with a proper regard for and deference to the opinions of each other.

You should consider that the case at some time must be decided and that you were selected in the same manner and from the same source from which any future jury must be selected. There is no reason to suppose that the case will ever be submitted to a jury more intelligent, more impartial or more competent to decide it or that more clear evidence will be produced on one side or the other.

In conferring together you ought to pay proper respect to each other's opinions with an open minded disposition to be convinced by each other's arguments. You should not, any of you, adopt a stubborn, close-minded attitude toward your responsibilities here. It is important that you should arrive at a verdict one way or the other, but only, of course, according to your convictions. You must not by reason of having taken a position at one time or another in the discussions, stubbornly adhere to that position without listening carefully to others and re-examining your views as well as the suggestions and ideas expressed by the other jurors with a view of ultimately reaching a verdict in which you can conscientiously join. This is very important, and I urge that you give full consideration to the matters I have suggested.

In making this statement I again emphasize that no jurors should surrender his or her conscientious conviction, and a verdict arrived at and to which a juror agrees must be his or her own verdict, the result of his or her own finally reached conclusions and convictions and not a mere acquiescence in the conclusion of others.

I am going to suggest to you that you retire again and carefully consider all of the evidence in the light of the Court's previous instructions, and after giving due and full consideration of the instructions that I have now given you.

(Continued on next page)

This charge was delivered after a weekend break in the deliberations and a note from the jurors that they remained divided and did not feel further discussion would resolve their differences. This charge was given without objection from defense counsel. In fact, defense counsel agreed that the jury should continue deliberations (R. Vol. VI, 1175) before the charge was given. (R. Vol. VI, 1177-79). We confidently conclude that this mild and balanced charge is within the boundaries sanctioned by *United States v. Bailey*, 468 F.2d 652, *rehearing en banc*, 480 F.2d 518 (5th Cir. 1973), and the numerous cases cited and discussed therein.

The last criticized court communication with the jury, reproduced below,[2] is not an *Allen* charge. Rather, the trial court, by written note, simply observed that the jury had reached a verdict on one count of the indictment

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I am obliged to ask that you again retire, and the Court will wait for a further message from you after your continued deliberations.

Now, members of the jury, it is about 11:00 o'clock. When you want to go to lunch, you just tell the marshal and he will take you, but remember the instructions of the Court: do not discuss the case among yourselves or with anyone else and do not permit anyone to discuss it with you when you are out of the jury room. When you have completed your lunch, the marshal will bring you back to the jury room, and, marshal, it will be all right if you will leave the exhibits there and lock the jury room door when the jurors leave.

Ladies and gentlemen, you may now be excused to continue your deliberations.

(R. Vol. VI, 1177-79).

[2] At 2:30 p. m. on Monday, January 23, 1978, the jury informed the court that it had reached a unanimous decision on one count of the indictment. With appellant's and his counsel's consent the court sent the following note to the jury:

> Ladies and gentlemen of the jury, I have received your last note in which you indicate the jury has reached a unanimous verdict with respect to one count of the indictment. Even though you had previously indicated that you had been deadlocked, it is obvious that you have made some progress. Under the circumstances, I am going to ask you to please continue your deliberations.

(R. Vol. VI, 1186).

On that same afternoon at 4:20 p. m. the jury reached a unanimous decision on all five counts of the indictment.

which was evidence of progress and asked the jurors to continue their deliberation. This final communication was approved prior to its delivery by both appellant and his counsel (R. Vol. VI, 1183-84). Having obtained the verdict he sought, but obviously not the one he desired, appellant Cook cannot now validly complain about the meticulously correct procedures employed by the trial court in meeting his wishes.

IV. PROSECUTORIAL MISCONDUCT

Cook asserts that the prosecutor's closing argument was so prejudicial as to deny him a fair trial. The test to be applied in resolving this issue is well settled: Does the prosecutor's argument, taken as a whole in the context of the entire case, prejudicially affect substantial rights of the defendant? *Berger v. United States*, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935); *United States v. Rodriquez*, 503 F.2d 1370 (5th Cir. 1974).

The appellant isolates five specific portions of the Government's closing argument as detrimental. During the course of his argument, the prosecutor commented that "If [the equipment] ran, then Owen Cook was defrauding the Government of money. If they didn't, then he was not only defrauding the Government of money, he was endangering the lives of servicemen in our national defense." (R. Vol. VI, 1074). Of the several arguments which appellant attacks on appeal, only this one was considered serious enough by defense counsel to object at trial. Upon objection, the trial judge instructed the jury not to consider the argument:

> Well, I will instruct the jury not to consider the argument, although I don't think counsel said that there was any evidence to that effect. He was simply drawing a conclusion if there had been evidence to that effect he would have been endangering the safety of those people who worked on it, but members of the jury, I will instruct you not to consider the argument.

(R. Vol. VI, 1075).

Any potential prejudice was thus dispelled by this curing instruction as in *United States v. Arteaga-Limones*, 529 F.2d 1183, 1191 (5th Cir.), *cert. denied*, 429 U.S. 920, 97 S.Ct. 315, 50 L.Ed.2d 286 (1976).

Defense counsel did not interject an objection at trial to the other four complained of portions of the Government's closing statement, reproduced below.[3] Since no objection was voiced at the time these statements were made, we must affirm in the absence of "plain error." *United States v. Juarez*, 566 F.2d 511, 516-17 (5th Cir. 1978); *Dupoint v. United States*, 388 F.2d 39, 45 (5th Cir. 1967). Our review of this record as a whole persuades us that the prosecutor's concededly improper comments were harmless beyond a reasonable doubt.

V. INSTRUCTIONS TO THE JURY

Appellant asserts three errors regarding the jury instructions: 1) the trial court refused to give requested instructions on mistake of fact; 2) the court erroneously instructed the jury that the requirement of knowledge was met if

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[3] (1) "The most important thing, though: what about the W-2's? He testified he was a commission agent. He reported some of his money on his income tax returns. I lay you odds, ladies and gentlemen, he didn't report the $13,000 cash he took out of that. No W-2's to the government that Owen Cook, a commissioned agent, earned blank amount in commission and sales or income this year. Not a bit, no withholding, nothing. Legitimate company? Incredible, does not merit belief."
R. Vol. VI, 1066.

(2) Prosecutor mentioned testimony elicited from Mr. Cook "when he finally took the stand."
R. Vol. VI, 1124.

(3) "[T]hat is what we have proven to you, people — a man that was, according to his secretary, making $70,000 a year out of an insurance business — and good for him if that was legitimate . . ."
R. Vol. VI, 1135-36.

(4) "I don't care whether [the machines] worked — well, I do care whether it worked. I'd like to think very much that it worked. I would like to think very much that the Air Force has got a piece of equipment that may have worked; it may have had a Sherwin-Williams overhaul; as long as it worked the Air Force doesn't care, really."
R. Vol. VI, 1128.

defendant acted with "reckless disregard" for the truth; and 3) the court incorrectly charged the jury in reference to his "supervisory capacity" as President of Mikelco of Bandera, Inc.

In order to prevail under his first ground, appellant must demonstrate that his requested instruction was a correct one and that it had not been substantially delivered by the trial court. *Pine v. United States*, 135 F.2d 353 (5th Cir. 1943). This the appellant cannot demonstrate. Appellant's requested instruction on mistake of fact was substantially given. The trial court did instruct the jury that "[a]n act is done knowingly if done voluntarily and intentionally and not because of mistake or accident or other innocent reason." Shortly thereafter, the court reiterated in its definition of "willfully" that the act had to be committed voluntarily, intentionally, with knowledge that it was prohibited by law and with the purpose "to disobey or to disregard the law and not by mistake, accident or in good faith." In reviewing a jury charge, the charge must be read and examined in its entirety. *United States v. McCoy*, 539 F.2d 1050 (5th Cir. 1976), *cert. denied*, 431 U.S. 919, 97 S.Ct. 2185, 53 L.Ed.2d 230 (1977). In light of the court's inclusion of mistake and accident in its charge together with its standard instructions on the presumption of innocence and burden of proof with a definition of reasonable doubt, appellant's vigorous contention that the trial judge did not adequately apprise the jury of Cook's good faith belief in the supplying of parts must fail.

Appellant objects to the standard of knowledge employed in the jury charge. The charge read in pertinent part:

> It is necessary that you find beyond a reasonable doubt that any act you may have found beyond a reasonable doubt to have been committed by the defendant was done or committed knowingly. In this connection, however, you are instructed that a person who makes a claim or causes a claim to be made with reckless disregard for the truthfulness of the claim and with the conscious purpose to avoid learning the truthfulness

> of the claim is deemed to have knowledge of the claim and its truthfulness or lack thereof.

Cook asserts that the charge is erroneous on the ground that reckless disregard of the falsity of the statement and a conscious effort to avoid learning the truth does not constitute "knowledge." As an alternative, appellant suggests the charge should have contained the balancing instruction contemplated by the Model Penal Code.[4]

A virtually identical charge to the one here questioned was lately approved by this court in *United States v. Evans*,[5] 559 F.2d 244 (5th Cir.), *cert. denied*, 434 U.S. 1015, 98 S.Ct. 731, 54 L.Ed.2d 759 (1978), a case involving a prosecution pursuant to 18 U.S.C. § 1001. A similar "deliberate ignorance" charge was also recently upheld in *United States v. Restrepo-Granda*, 575 F.2d 524 (5th Cir. 1978). The decisions from other circuits harmonize with the expressed conclusion that deliberate ignorance is the equivalent of knowledge under statutes similar to the one involved.[6]

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[4] Model Penal Code § 2.02(7) on which appellant bases his argument provides in part: "When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if, a person is aware of a high probability of its existence, *unless he actually believes that it does not exist.*" [Emphasis supplied].

[5] In *United States v. Evans*, 559 F.2d 244, 246 (5th Cir.), *cert. denied*, 434 U.S. 1015, 98 S.Ct. 731, 54 L.Ed.2d 759 (1978) the sanctioned charge was:

> However, a person who makes a statement with reckless disregard of the truthfulness of the statement and with the conscious purpose to avoid learning the truthfulness of the statement, is deemed to have knowledge of the statement and its truthfulness or lack thereof.

Except for the substitution in the case at bar of the word "claim" for the word "statement" in the charge approved in *Evans*, the two charges are identical.

[6] In *United States v. Jacobs*, 475 F.2d 270, 287-288 (2nd Cir. 1973), the court reasoned that the Supreme Court's approval of the Model Penal Code definition of knowledge implies approval of an instruction that the knowledge requirement is satisfied by proof of a "conscious purpose to avoid learning the truth."

Finally, appellant contends that the court improvidently encouraged the jury to examine his conduct in his capacity as President of Mikelco of Bandera, Inc. This is so, it is argued, because the recklessness charge was given in connection with discussion of this supervisory capacity. The charge reads:

> You are instructed that you cannot find a defendant guilty with respect to any count in the indictment merely from the fact, if you find it was a fact, that he was president of this Mikelco of Bandera, Inc. It is necessary that you find beyond a reasonable doubt that any act you may have found beyond a reasonable doubt to have been committed by the defendant was done or committed knowingly. In this connection, however, you are instructed that a person who makes a claim or causes it to be made with reckless disregard for the truthfulness of the claim and with the conscious purpose to avoid learning the truthfulness of the claim is deemed to have knowledge of the claim and its truthfulness or lack thereof.

The defendant faults the instruction because "[t]he court did not remind the jury that 'in this connection' (*i.e.* as president), only defendant's *willful actions* could be considered, as section 2(b) requires." The phrase "in this connection" logically does not relate back to appellant's position as President of Mikelco. It refers to the sentence immediately preceding, where the jury was charged that it could not find Cook guilty unless it found beyond a reasonable doubt that he acted "knowingly."[7]

Having considered the arguments raised by appellant, we conclude that there was no reversible error. The judgment of the district court is AFFIRMED.

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[7] This identical "supervisory capacity" charge was requested by appellant.

United States Court of Appeals
FIFTH CIRCUIT

EDWARD W. WADSWORTH
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Office of the Clerk

February 2, 1979

TO ALL PARTIES LISTED BELOW:

NO. 78-5173 — UNITED STATES OF AMERICA v. OWEN G. COOK, JR.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Circuit Rule 16) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By SALLY HAYWARD
Deputy Clerk

cc: Mr. Jack Paul Leon
Messrs. Morris Harrell
Daniel J. Riley
Marshall J. Doke, Jr.
Ms. Le Roy Morgan Jahn

RESOLUTION ADOPTED BY HOUSE OF DELEGATES AT THE 1979 MID-YEAR MEETING OF THE AMERICAN BAR ASSOCIATION

The American Bar Association resolves that:

* * *

The Association opposes any provision which goes beyond generally applicable rules of complicity to charge an agent of an organization with responsibility for conduct of another agent except where the agent has with respect to a particular offense the authority and the opportunity to prevent that offense, has in that case a knowing state of mind with respect to all elements of the offense, and omits to prevent the offense. The Association specifically opposes any provision which would impose criminal liability on an individual based on reckless failure of supervision.